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Office of Administrative Law Judges
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Issue Date: 26 March 2003

Case No: 2002-BLA-0219

In the Matter of

ROBERT VANOVER,

Claimant

v.

BULLION HOLLOW COAL CO.,

Employer,

OLD REPUBLIC INSURANCE CO.,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:

Merritt K. Alcorn, Esquire
For the claimant

Gayle G. Huff, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On January 25, 2002, this case was referred to the Office of Administrative Law Judges for a formal hearing. Following proper notice to all parties, a hearing was held on August 6, 2002 in Louisville, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence and to present closing arguments or post-hearing briefs.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. whether the claim was timely filed;

2. the length of the miner's coal mine employment;

3. whether the miner has pneumoconiosis as defined by the Act and regulations;

4. whether the miner's pneumoconiosis arose out of coal mine employment;

5. whether the miner is totally disabled;

6. whether the miner's disability is due to pneumoconiosis;

7. the number of the miner's dependents for purposes of augmentation of benefits;

9. whether the evidence establishes a change in conditions or a mistake in a determination of fact within the meaning of Section 725.310.

The employer also contests other issues that are identified at line eighteen on the list of issues. (DX 41). These issues are beyond the authority of an administrative law judge and are preserved for appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, Robert Vanover, was born on January 15, 1954. Mr. Vanover married Burdette Bannister on November 24, 1994, and they currently reside together. On his application for benefits, claimant alleged that he has one dependent child, Jody L. Vanover, born November 2, 1976, who is disabled. (DX 1). At the hearing, Mr. Vanover testified that Jody was disabled for a period of time, but that he was now working. He estimated that Jody began working about six months prior to the hearing. (Tr. 26-29). A statement from Social Security indicates that Jody was granted Social Security benefits for a disability in April 1993. (DX 6). Accordingly, I find that Jody was an eligible dependent of Claimant for purposes of augmentation until May 2002.

Claimant testified that his last coal mine employment was with Bullion Hollow in July 1992. (Tr. 14). He testified that he first began having trouble breathing in the 1980's. He has used oxygen to help breathe since 2000. He sees Dr. Acorn for his breathing problems, because it feels like he is "breathing with a pillow overhead." Dr. Acorn has prescribed medication to help claimant's breathing. Claimant has not worked since June 1992 and began receiving Social Security in 1998, which included some back pay.

Mr. Vanover filed his first application for black lung benefits on April 7, 1993. (DX 40). The claim was denied by an administrative law judge on August 8, 1987. (DX 40-13). Claimant filed the current claim for benefits on March 16, 2000. (DX 1). The Office of Workers' Compensation Programs denied the claim on August 4, 2000 and after reviewing additional evidence again denied the claim on September 27, 2000. (DX 19, 24). Claimant filed a request for modification on June 27, 2001. (DX 27). The modification request was denied on November 29, 2001. (DX 35). Pursuant to claimant's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 36).

Timeliness

Under Section 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. In September 1995, Dr. W.F. Clarke examined Claimant and issued an opinion finding him totally disabled due to pneumoconiosis. As mentioned above, the claim for benefits was filed on March 16, 2000.

The Sixth Circuit Court of Appeals, in which this case arises, recently held that a claimant who receives a medial determination that he is totally disabled from pneumoconiosis, but does not meet the legal requirements for benefits under the Act is not barred by the statute of limitations from filing a subsequent claim. *Peabody Coal Co. v. Director, OWCP*, 48 Fed.Appx. 140 (6th Cir. 2002). The Sixth Circuit found that "if a miner's claim is ultimately rejected on the basis that he does not have [pneumoconiosis], this finding necessarily renders any prior medical opinion to the contrary invalid and the miner is handed a clean slate for statute of limitations purposes." *Id.* at 145. Thus, I find that this claim was timely filed.

Coal Mine Employment

The duration of a claimant's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. In his application for benefits, Mr. Vanover claimed nineteen to twenty years of qualifying coal mine employment. At the hearing, the parties stipulated that Mr. Vanover worked for ten years in qualifying coal mine work, based on previous determinations in this case. (Tr. 10-11). Based upon my review of the record, I accept the stipulation as accurate and credit claimant with ten years of coal mine employment.

At the hearing, Claimant testified that he worked in the coal mine industry from 1970 to 1992, with some periods of time off because of lay-offs and when he was in between jobs. He testified that he began his coal mine employment in 1970 with S&M Mining, where he worked until 1975. He stated that in 1977 he worked for KCB Coal. Claimant testified that he last worked in the coal mines with Bullion Hollow in 1992. His last job was as a roof bolter with Bullion. Claimant was responsible for drilling holes in rock, placing bolts in the roof and using the roof bolter machine. (DX 3; Tr. 14-18).

Medical Evidence[1]

A. X-ray reports[2]

Date of Exhibit	Date of X-ray	Physician/ Reading	Qualifications	Interpretation
DX 11	3-29-00	3-29-00	Baker/ B	1/1; p/q; all zones
DX 12	3-29-00	5-19-00	Gaziano/B	2/2; q/q; all zones
DX 13	4-21-00	4-21-00	Regan	Fibrotic changes in both lungs
DX 14	4-21-00	5-19-00	Gaziano/B	½; q/t; all zones
DX 27	9-11-00	9-11-00	Skiles	Chronic lung disease
DX 28	1-5-01	7-12-01	Gaziano/B	1/1; p/q; 5 zones
DX 30	4-21-01	8-9-01	Halbert/BCR/B	No evidence of Pneumoconiosis
DX 33	4-30-01	10-19-01	Dahhan/B	0/1; q/q; upper 2 zones
DX 33	4-30-01	10-24-01	Kendall/BCR/B	Completely negative
DX 33	4-30-01	10-29-01	West/BCR/B	Completely negative
DX 34	4-30-01	11-06-01	Halbert/BCR/B	Completely negative
DX 34	4-30-01	11-7-01	Poulos/BCR/B	Completely negative

[1] As the instant claim is for modification, only the newly submitted evidence set forth in this opinion is necessary for the initial inquiry of whether Claimant has established a change in conditions. The previously submitted evidence is relevant to whether a mistake in fact exists and also must be examined should Claimant establish a change in conditions. Thus, the previously submitted evidence as summarized in the August 8, 1987 decision and order is hereby incorporated by reference. (DX 40-13). .

[2] A chest x-ray may indicate the presence or absence of pneumoconiosis as well as its etiology. It is not utilized t determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

B. Pulmonary Function Studies[3]

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 7	Pierce	46	2.66	3.24	127		Yes	Good effort
4-21-00		68”	3.01*	3.75*	119*			
DX 9	Baker	46	2.54	3.08			No	Good effort
3-29-01		68”						
DX 27	Wright	47	2.86	3.60			Yes	Good effort
4-30-01		68”	2.47*	3.14*				

*denotes testing after administration of bronchodilator

C. Arterial Blood Gas Studies[4]

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise	Comments
DX 10	4-21-01	Pierce	27	113	Resting	

[3] The pulmonary function study, also referred to as a ventilatory study or spirometry, measures obstruction in the airways of the lungs. The greater the resistance to the flow of air, the more severe any lung impairment. A pulmonary function study does not indicate the existence of pneumoconiosis; rather, it is employed to measure the level of the miner's disability. The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two tracings is in “substantial compliance” with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

[4] A blood gas study is designed to measure the ability of the lung to oxygenate blood. The initial indication of a miner's impairment will most likely manifest itself in the clogging of alveoli, as opposed to airway passages, thus rendering the blood gas study a valuable tool in the assessment of disability.

D. Narrative Medical Evidence

Dr. Gene Pierce examined Claimant on April 21, 2000. He noted that he reviewed an attached coal mine employment form. Dr. Pierce also noted that Claimant had never smoked. The physician documented complaints of sputum, dyspnea, cough, chest pains because of lungs, orthopnea, ankle edema, and paroxysmal nocturnal dyspnea. Dr. Pierce performed an x-ray, which he indicated showed some fibrosis. He also performed a pulmonary function test, which indicated a moderate restrictive defect, and an arterial blood gas study. Under the category "diagnosis," Dr. Pierce's hand-written report contains a figure or symbol that is indecipherable. Dr. Pierce found a moderately severe impairment, but did not state a diagnosis or etiology for the impairment. (DX 8).

Dr. Glen Baker examined Claimant on March 29, 2000. He noted twenty years of coal mine employment, ending in 1992, and that Claimant was a non-smoker. He noted complaints of breathing problems for the past fifteen years, with daily symptoms of cough, sputum production, wheezing, difficulty sleeping, and shortness of breath on walking 100 yards. Dr. Baker performed an x-ray, which he read as positive for pneumoconiosis. He also performed a pulmonary function study, which showed a mild restrictive defect, and an arterial blood gas study, which was normal. Dr. Baker diagnosed coal miner's pneumoconiosis, based on the positive x-ray and a significant exposure history. He also diagnosed chronic bronchitis, based on history. The physician found that the disease was a result of coal dust exposure and that there was no other condition to explain the x-ray and impairment. Dr. Baker found that Claimant has a Class II impairment, based on the Guides to Permanent Impairment, but indicated that he would be 100 percent impaired because the condition would require him to be removed from the mines. Dr. Baker is Board Certified in Internal Medicine and Pulmonary Disorders and is a B-reader. (DX 9).

Treatment records from King's Daughters' Hospital in Madison, Indiana and Claimant's treating physician are part of the record in this claim. These records document a hospital admission on September 11, 2000, with an acute exacerbation of hemoptysis and cough syndrome. The records indicate scarring consistent with black lung disease and exacerbation of chronic obstructive lung disease. The records note initiation of oxygen therapy, and that the patient has lack lung disease with pulmonary fibrosis and scarring. The records also evidence a bronchoscopy was performed and medication prescribed for Claimant. These records indicate that Claimant has chronic obstructive lung disease, black lung and bronchitis symptoms, and that the chronic bronchitis is associated with the underlying black lung disease. (DX 23).

Dr. Ballard Wright examined Mr. Vanover on April 27, 2001, noting complaints of several years of increasing shortness of breath, cough and wheezing. The physician noted that the miner had been hospitalized for chronic bronchitis and that a bronchoscopy was performed, ruling out tuberculosis, fungus disease and carcinoma. He noted that cultures were consistent with bacterial infection of the lung, and that Claimant was treated with bronchodilators, expectorants and antibiotics and uses nocturnal oxygen. Dr. Wright noted that claimant experiences dyspnea after walking two flights of stairs or walking one hundred yards. The physician also noted that Claimant is a non-smoker. Dr. Wright

performed an x-ray, which he read as positive for pneumoconiosis and noted that pulmonary function tests were essentially normal with some airflow obstruction, primarily in the small airways. He found a mild obstructive/restrictive defect. Dr. Wright also indicated that an electrocardiogram showed some rhythm irregularity. The physician diagnosed simple pneumoconiosis, category ½ and chronic bronchitis. He found that the conditions were related to Claimant's work environment because there are no other factors to contribute to the disease. Based on Claimant's job description of hard manual labor, Dr. Wright found that he did not retain the physical capacity to return to work. (DX 27).

Dr. A. Dahhan performed a review of Mr. Vanover's medical records, including the records of Drs Pierce and Wright and x-rays taken in 1993 and prepared a report of his conclusions. Based on his review, Dr. Dahhan determined that Claimant has radiographic evidence of simple coal workers' pneumoconiosis. The physician stated that there are no objective findings to indicate functional respiratory impairment or disability. He indicated that Claimant had normal post-bronchodilator results and normal gas exchange. Dr. Dahhan stated that Claimant has multiple medical problems, including hypoxic sleep apnea, which are not caused, contributed to or aggravated by coal dust exposure. He found that the miner retains the physiological capacity to continue his previous coal mine employment. Dr. Dahhan is Board-certified in Internal medicine and Pulmonary medicine and is a B-reader. (DX 32).

On October 25, 2001, Dr. Dahhan reviewed the x-ray taken on April 30, 2001. Dr. Dahhan again reviewed the record in this claim, and based on his negative interpretation of the x-ray, determined that Claimant does not have radiological evidence of simple coal workers' pneumoconiosis. (DX 33).

DISCUSSION AND APPLICABLE LAW

Because Mr. Vanover filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Modification

Section 725.310 provides that a claimant, employer, or the district director may file a petition for modification within one year of the filing of the last denial of benefits. Modification petitions may be based upon a change in condition or a mistake in a determination of fact. 20 C.F.R. § 725.310(a). On June 27, 2001, Mr. Vanover timely requested modification of the denial dated September 27, 2000.

In the prior denial, the Director determined that claimant did not have pneumoconiosis or any totally disabling respiratory or pulmonary disease arising from coal mine employment. The evidence submitted since this decision includes hospital records, x-ray reports, examination reports, reviews of the

medical evidence, pulmonary function studies, and arterial blood gas studies. Therefore, I will consider whether this evidence, in conjunction with the previously submitted evidence, establishes entitlement to benefits.

A. *Mistake of Fact*

In deciding whether the prior decision contains a mistake in a determination of fact, I must review all the evidence of record, including evidence submitted since the most recent denial. New evidence, however, is not a prerequisite to modification based upon a mistake of fact. *Nataloni*, 17 BLR at 1-84; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156, 1-158(1990), *aff'd on recon.* 16 BLR 1-71, 1-73 (1992). Rather, the factfinder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

I have reviewed the previous denial, and I cannot locate any mistake of fact. Likewise, Claimant has made no attempt to allege a specific mistake of fact beyond Claimant's implied challenge to the Director's factual determination that he is not entitled to benefits.

Accordingly, I shall proceed with my analysis to determine if the newly submitted evidence establishes a change in condition.

B. *Change in Conditions*

In deciding whether claimant has established a change in condition, I must "perform an independent assessment of the newly submitted evidence, in conjunction with evidence previously submitted, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement." *Napier v. Director, OWCP*, 17 BLR 1-111, 1-113 (1993). *See also Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). The circuit courts and Benefits Review Board have held that, for purposes of establishing modification, the phrase "change in conditions" refers to a change in the claimant's physical condition. *See General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982); *Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987); *Lukman v. Director, OWCP*, 11 B.L.R. 1-71 (1988) (*Lukman II*). *See, e.g., Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992) (letter from miner's physician indicating that the miner may have black lung disease did not establish a "change in conditions," but was sufficient to warrant reopening the claim based upon a "mistake in a determination of fact").

Pneumoconiosis and Causation

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of "pneumoconiosis" and they provide the following:

(a) For purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelai, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical,' pneumoconiosis and statutory, or 'legal,' pneumoconiosis.

(1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial cmounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or subtantially aggravated by, dust esposure in coal mine employment.

(c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. The newly submitted evidence contains ten interpretations of five chest x-rays. Of these interpretations, six were negative for pneumoconiosis while four were positive. Two x-rays were included in the record which were not specifically read for the presence or absence of pneumoconiosis. Thus, I give no weight to these interpretations.

The Board has held that an administrative law judge is not required to defer to the numerical superiority of medical evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990). *See also Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993) (use of numerical superiority upheld in weighing blood gas studies); *Tokaricik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1984) (the judge properly

assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease)

Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Viewing each x-ray individually, three films were interpreted as positive while two were interpreted as negative. However, taking into consideration the qualifications of the physicians, I give more weight to the readings of Drs. Halbert, Kendall, West, and Paulos, as they are dually qualified as both B-readers and board-certified radiologists. Furthermore, because pneumoconiosis is a progressive disease, I give greater weight to the two most recent x-rays, as they were taken more than a year after the first two x-rays in this case. Thus, after considering all of the x-ray evidence in the record, I find that the evidence does not establish the existence of pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984);

Gomola v. Manor Mining and Contracting Corp., 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

The record contains four narrative opinions regarding the existence of pneumoconiosis. I give no weight to the diagnosis of Dr. Pierce because it is illegible and I am unable to determine his opinion regarding the presence or absence of the disease.

Dr. Wright offers no rationale for his diagnosis of pneumoconiosis, other than a positive x-ray. Dr. Baker diagnosed pneumoconiosis based on a positive x-ray and exposure history. However, I afford these opinions little weight because they do not qualify as a sound medical judgment under section 718.202(a)(4). The Benefits Review Board has held permissible the discrediting of physician opinions amounting to no more than x-ray restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-10 (1993)(citing *Anderson v. Valley Camp of Utah, Inc*. 12 B.L.R. 1-111, 1-113 (1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In addition, the Sixth Circuit has intimated that bases such as dust exposure alone do not constitute "sound" medical judgments under section 718.202(A)(4). *Cornett v. Benham Coal Inc*., 227 F.3d 569 (6th Cir. 2000). In *Taylor*, the Board stated that when a doctor relies solely on a chest x-ray and coal mine employment to support his diagnoses, without explanation of how the duration of coal mine employment supports his diagnoses, this renders the opinion "merely a reading of an x-ray . . . and not a reasoned medical opinion." *Id*. Accordingly, on this issue, I grant no weight to the reports of Drs Baker and Wright.

Dr. Dahhan initially determined that there was radiographic evidence of pneumoconiosis, but after personally interpreting the most recent x-ray of record, determined that the miner does not have radiographic evidence of pneumoconiosis. I grant little weight to the opinion of Dr. Dahhan on this issue as it is merely a recitation of the x-ray evidence, and not a reasoned determination of the existence or absence of pneumoconiosis.

It is Claimant's burden to establish the presence of pneumoconiosis. After reviewing the evidence, I find that the medical opinions in this case fail to establish the existence of the disease.

The Claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis under any of the methods contained in section 718.202(a). Therefore, he has failed to establish a change in conditions with the presence of pneumoconiosis. Thus, I will evaluate the evidence to determine whether Claimant has established a change in his conditions regarding the presence of a totally disabling respiratory impairment.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-

respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies.[5]

All ventilatory studies of record, both pre-bronchodilator and post-bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981).

The record contains reports of five pulmonary function studies. A study done by Dr. Baker does not include tracings as required; however, the values produced are higher than the standards under the Act for determining total disability. The remaining four studies also failed to produce qualifying values. Thus, I find Claimant has failed to establish total disability by means of pulmonary function studies.

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated). Similarly, in *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1045 (10th Cir. 1990) and *Twin Pines Coal*

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A "non-qualifying" test produces results that exceed the table values.

Co. v. U.S. DOL, 854 F.2d 1212 (10th Cir. 1988), the court held that the administrative law judge must consider a physician's report which addresses the reliability and probative value of testing wherein he or she attributes qualifying results to non-respiratory factors such as age, altitude, or obesity.

The record contains a report of one arterial blood gas study. This study produced values which exceed the Acts standards for establishing total disability. Thus, I find Claimant has not established total disability by arterial blood gas studies.

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). A non-examining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984); *Easthom v. Consolidiation Coal Co.*, 7 B.L.R. 1-582 (1984).

The newly submitted evidence contains four narrative medical opinions on the issue of whether the miner is totally disabled. Dr. Pierce found a moderate restrictive defect based on a pulmonary function study. He determined that the miner has a moderately severe impairment. However, he did not explain the basis for this conclusion, nor did he state whether the miner would be able to perform his last coal mine employment in light of this impairment. Thus, I give no weight to the opinion as it is not well-reasoned.

Dr. Baker found Claimant was totally disabled. He found a mild restrictive defect in the pulmonary function study but failed to explain how this mild defect rendered the Claimant totally disabled from

a respiratory standpoint. Dr. Baker's opinion fails to explain the non-qualifying pulmonary function studies and arterial blood gas study in light of his total disability determination. Furthermore, Dr. Baker's opinion that Claimant is totally disabled appears to be based on his opinion that Claimant's condition would require him to be removed from the mines, not on the basis of the degree of impairment itself.

In the same manner, Dr. Wright determined that Claimant is totally disabled, but failed to adequately explain his determination. He determined the level of disability based on the Physician Guides to Evaluation of Permanent Impairment on recalculated pulmonary function study values, not by the Act's standards. I also find Dr. Wright's opinion is not well-reasoned as he failed to explain the non-qualifying pulmonary function studies and arterial blood gas study in light of his total disability determination. Thus, I afford it little weight on this issue.

Dr. Dahhan reviewed the medical evidence and determined that there are no objective findings to support a determination that Claimant is totally disabled from a respiratory standpoint. Dr. Dahhan noted the studies and findings which support his conclusions. On this issue, I find Dr. Dahhan's opinion fairly well-reasoned and documented and thus, afford it probative weight.

Considering all of the probative evidence on the issue of total disability, I find that Claimant has failed to establish by a preponderance of the evidence that he is totally disabled from a respiratory standpoint. Thus, Claimant has failed to establish a change in conditions with a determination that he is totally disabled.

Conclusion

In sum, the evidence does not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Furthermore, Claimant's failure to establish any element previously adjudicated against him, results in a failure to demonstrate a change in conditions. Accordingly, the modification claim of Robert Vanover must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim Robert Vanover for benefits under the Act is denied.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2605, Washington, D.C. 20210.